Remarks by Justice Carlos Moreno

Orange County Trial Lawyers Association
Santa Ana, January 13, 2006

Before getting into the substance of my talk on the polarization of America and its impact on judicial independence, I wanted to say a few words about our recent work on the California Supreme Court.

This week at oral argument our court had the distinct pleasure of welcoming our newest justice, Justice Carol Corrigan, who previously sat on the First District Court of Appeal in San Francisco, and before that on the trial courts in Alameda County. All of us look forward to working with Justice Corrigan in the months and years to come – there is no question that her intelligence, compassion and wit will be enjoyed and respected by those who practice before our court.

We recently concluded our last term for 2004-2005, having decided a number of significant and interesting cases:

- Considered predispute jury trial waivers in the absence of an arbitration provision;
- Decided the validity of class action arbitration waivers in a mass-mailing, credit card statement context;
- Considered issues relating to limitations on punitive damages in a pair of cases, following the State Farm insurance case;
- Addressed issues of parentage and ova (egg) transfers among same sex couples in a trilogy of cases;
- Addressed the question of marital status discrimination in the context of public accommodations under the Unruh Act and the Domestic Partnership Act;
- Interpreted the recent *Booker* U.S. Supreme Court case eviscerating the federal sentencing guidelines and its impact on our own state sentencing rules.

And I can assure you we will continue to address a number of issues critical to litigants and lawyers in our state in the months and years to come.

Of course, at some point in the coming months or year or so, we will very likely consider the constitutionality of same sex marriages in California under the California Constitution.

All judges acknowledge, and lawyers expect, and the public depends upon the neutrality and impartiality of judges sworn to follow the law. Judge Learned Hand, no doubt one of greatest judges of American jurisprudence, was often referred to as the "tenth justice of the Supreme Court", though he was never a member of that Court. On the independence of the judiciary, Judge Hand once said, "[I] cannot quite swallow the necessity of having public pressure put on a judge for any purpose, for it so utterly perverts the assumption which is fundamental in his function." That is to remain fair and impartial above all else. Judge Hand no doubt recognized and foresaw the potential danger when judges bow to popular opinion.

As judges we have an obligation to serve the public interest and to render fair decisions based on the law – even the Framers recognized this. But our political climate today has become increasingly polarized. Whether generated by the war on terrorism or the war in Iraq, the 2000 Bush vs. Gore anointment (election), or the incessant battles in the culture wars for the hearts and minds of America, it matters not. Increasingly, we are identified as either Democrats or Republicans, red states or blue states, pro-choice or right to life. We debate the implications of stem cell research; we argue about theories of evolution, creationism, and intelligent design. We consider the rights of gays and lesbians vs. straights, fundamentalists vs. whoever else is out there.

We have become a nation of opposites, a nation of contradictions; we wrestle with vast socioeconomic disparities in our states and cities; our media, and our elections, are punctuated by plain old spin and propaganda. And no one seems to listen to the other side, as facts are distorted and personal attacks carry the day.

Now these deep schisms in our society have no doubt existed before, and perhaps they are even cyclical in nature. But the intensity and vehemence with which much of the debate has been conducted must give one pause. And now, much of that vehemence and rhetoric is focused on the judiciary, on judges like me, and on many of the judges here tonight.

Congressman Tom DeLay has been quoted as saying,

"the judges need to be intimidated; they need to uphold the constitution. If they don't behave, we're going to go after them in a big way."

I guess he didn't realize then that some day he might be indicted and dependent upon fair rulings by an impartial judge, Democrat or Republican, sworn to uphold the rule of law.

Another congressman has even gone so far as to suggest that recent physical assaults on judges and their families and staff in Chicago and Atlanta were prompted by the controversial decisions judges have made on issues totally unrelated, totally unrelated, to those attacks.

I also want to report on two more recent and disturbing developments:

Pennsylvanians went to the polls last November. Among the matters on the ballot was the retention of two members of the state Supreme Court for 10-year terms. Four months earlier, legislators had enacted a pay raise for themselves, to the great dismay of many citizens of the state. However, no legislators were on the upcoming ballot to provide a target for disgruntled voters. Instead, some groups turned their ire toward the judges, arguing that they had benefited from the legislative vote, which granted them raises as well, although they themselves had not voted on the issue.

According to an article in the New York Times, leaders of the movement to repeal the pay raises characterized the judges as "dupes of the legislature." The Times stated that "rather than attacking the justices as too meddlesome in legislative affairs, people are complaining that they have not done enough." Some voters stated that they would vote "no" on the judges in order to "send a message." And a local county party chairman explained that "most importantly, this was a symbolic move." One of the Pennsylvania Supreme Court justices lost his seat and the other narrowly retained her position.

It is ironic, isn't it, that this claim of judicial passivity stands in sharp contrast to more familiar claims of judicial activism. And the latter term often seems to be synonymous with subjective disagreement with a decision that a court has reached, no matter what the basis for the decision or the reasoning employed by the judges.

In another example:

There is a proposed amendment to the South Dakota Constitution, with information in mass mailings being sent to every business in the state. The proponents are using paid circulators to gain signatures to put their amendment on the ballot. The amendment would remove judicial immunity — a long-standing principle that provides protection for judges from suit based upon their actions taken in the course and scope of their duties as a judge. It would create a "special Grand Jury," a 13-member group charged with reviewing civil lawsuits against

judges to determine whether they are frivolous or harassing, and with the power to indict judges for criminal conduct based upon their judicial decisions.

The proponents' declared purposes include ensuring that "judges will be held accountable for malfeasance of office for lenient treatment of criminals," as well as creating "a mechanism wherein the people can override 'judicial immunity' and punish wayward judges with civil suits and even criminal charges. After three adverse rulings — the equivalent of a "Three Strikes" Law applicable to judges — incorrigible judges would be banned for life from holding any judicial position."

Proponents have chosen South Dakota because they think it would be an inexpensive state to get the ball rolling." Evidently the movement started here in California and describes itself as the Judicial Accountability Initiative Law, with the none too subtle acronym J.A.I.L.

Now this may seem a farfetched attempt at challenging judicial power, but rhetoric accusing judges of activist rampages against constitutional rights and thwarting the public will can be heard from many quarters. And the partisan politicization of the judiciary and of the role of the courts, whether in the debate on nominees to the United States Supreme Court or in local judicial election races, is a growing and deeply troubling trend.

When legislators disagree with a court's ruling, when actions by the legislative and executive branches are called into question, no one mentions that in our system of government the responsibility of determining the constitutionality of these actions falls squarely on the judiciary. No one mentions that we must make our decision without regard to popular opinion, public sentiment. It is important that the public understand that judges must decide cases free from intimidation and the influence of public opinion and to base their decisions exclusively on the rule of law and the specific facts before them. Our reasoning as judges is not intended to be a response to the majority, but to the notion of law. We are not, and should not be, accountable to any particular point of view or to any particular constituency. We are accountable to the law and the Constitution. Otherwise, chaos will surely follow.

As judges we must make difficult choices in interpreting the Constitution on matters related to church and state, or the right to an abortion, on the right to life, on the right to die. We must consider ever-evolving standards of equality and decency, here and abroad. We consider the rights of same sex domestic partners, the constitutionality of the death penalty. Difficult, difficult issues. Difficult times.

And while judges are subject to the same societal pressures that everyone is exposed to, most people expect, and the Constitution requires, that judges will rise above any personal preferences in reaching their decisions under the law.

No doubt times have changed, but we are polarized now more than we have ever been before. Lawyers, who are on the front lines, but also the general public, should appreciate that we must support the independence of the judiciary. Otherwise, I can assure you, democracy will fail.

So we must keep our judiciary free; we must keep it strong, and we must keep it independent to make sure that the rule of law will prevail. That our decisions will continue to flow from the law and the Constitution, and not from the passions of the moment.

This is what makes our country great.

This is what distinguishes our country from so many other countries that seek democracy.

Our greatest ally in this endeavor to preserve the independence of the judiciary, our most informed ally, the ally that we as judges will look to will be you, the lawyers. Lawyers who reasonably rely on the neutrality and impartiality of judges sworn to follow the law. We who are judges hope that you look beyond your individual circumstances, your individual case. We hope that you envision, as I do, a justice system that protects all of us - the poor as well as the wealthy, the weak and the strong, the healthy and the sick - all of us who make America great.

So I encourage you to keep informed about the judicial system, its vulnerable role in our system of government, its efforts to reach out to the greater community, and the challenges it faces.

California's judicial system is the largest in the nation (and perhaps anywhere), with more than 1,600 judges and approximately 400 court commissioners — much larger than the federal court system nationwide. Each year, millions of matters are heard and disposed of in California's courts. We have been most fortunate to have individuals on our state bench striving to render justice fairly, objectively, and effectively. Your participation in the debate about the role of the judiciary will be important in maintaining our state's tradition of providing fair and accessible justice to all. I hope you will continue to focus on this crucial issue and contribute to the discussions concerning the proper role of the judiciary in our society.

I know that my judicial colleagues throughout the country realize and appreciate that they are dependent on an enlightened and supportive bar and it is something that we judges should not forget regardless of what court we sit on, from the lowliest justice court to the U.S. Supreme Court.

In the end, as a nation polarized, amidst the rhetoric, name-calling, and ad hominem attacks, we must rely on a calm, neutral, and dispassionate mediator to resolve, or at least temper, the debate on the many divisive issues that face our complex society. Our courts have fulfilled that role for hundreds of years and the courts will survive even this latest assault on their integrity and independence. We have no choice because as Justice Anthony Kennedy has stated,

"the law makes a promise — neutrality. If the promise gets broken, the law as we know it ceases to exist. All that's left is the dictate of the tyrant, or perhaps a mob."

Thank you for giving me this opportunity to address this distinguished audience. I hope that I have not offended any of you and hope that I have at least provoked all of you to consider the challenging times that we face in the profession in the years to come. Thank you.

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